Supreme Court, U.S.
FILED
NOV 17 2010
OFFICE OF THE CLERK

No. 10-554

In the Supreme Court of the United States

BRADLEY J. STINN,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus curiae the Center on the Administration of Criminal Law ("the Center") respectfully submits this brief in support of Petitioner Bradley J. Stinn.[1] The Center, based at the New York University School of Law, is dedicated to defining and promoting good government practices in the criminal justice system through academic research, litigation, and participation in the formulation of public policy. In general, the Center's litigation practice encompasses cases in which the exercise of prosecutorial or judicial discretion raises significant substantive legal issues. A primary guiding principle in selecting cases to litigate is to identify those in which discretion may be exercised to engage in overaggressive or unwarranted interpretations of the Constitution, statutes, regulations, or policies in a way that diverges from standard practices or raises fundamental questions of defendants' and citizens' rights. The Center also defends the exercise of prosecutorial and judicial discretion where those discretionary decisions comport with applicable law and standard practices and are consistent with law enforcement priorities.

The Center's appearance as *amicus curiae* here is prompted by its concern that allowing courts to remove

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

holdout jurors without clear and convincing evidence of a compelling and neutral reason for doing so will undermine the meaning and purpose of the constitutional right to trial by jury. Thus, this case is an important one to the Center's mission.

SUMMARY OF ARGUMENT

It is vitally important for this Court to safeguard the constitutional role of the criminal jury and to ensure that a jury's verdict represents the unanimous decision of a fair cross-section of the community. Where, as in this case, a judge issues an *Allen* charge after the identity of a lone holdout juror has been revealed – and then subsequently removes that juror where the context suggests that her removal was based, at least in part, on her position during deliberations – the result invites questions about the legitimacy of both the jury process and the ultimate verdict. Those questions take on an added significance where, as here, the lone holdout identifies with a segment of the community that has historically been excluded from jury participation. In short, practices that have the effect of limiting full and fair participation in jury deliberations are no less pernicious under the Constitution than practices that systematically exclude certain groups from participating in the first instance. The petition for a writ of *certiorari* should be granted.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant *Certiorari* Because The Removal Of A Lone Holdout Juror Under The Circumstances Here Violated Article III And The Sixth Amendment And Undermines The Framers' Original Intent That The Right To Trial By Jury Would Act As A Bulwark Against Government Overreaching

The constitutional right to trial by jury in criminal cases is "fundamental to our system of justice" and "is granted to criminal defendants in order to prevent oppression by the Government." *Duncan v. Louisiana*, 391 U.S. 145, 153, 155 (1968). In order to secure this core right, this Court has recognized that, at least in federal cases, the Constitution guarantees defendants a *unanimous* verdict. The unanimity requirement is essential to the jury fulfilling its responsibility as a check on government overreaching. The removal of a lone holdout juror under the circumstances presented here undermines the unanimity requirement and erodes the fundamental protections guaranteed by Article III and the Sixth Amendment.

A. The Framers Understood That The Right To Trial By Jury Encompassed A Unanimity Requirement That Would Serve As A Powerful Check Against Oppression By The Government And The Majority

Dating back to the mid-14th century, the unanimous jury verdict "had become an accepted feature of the [colonial] common-law jury" by the time of the 18th century, and was regarded as a bulwark against the abuse of royal power. *Apodaca v. Oregon*,

406 U.S. 404, 408 (1972); *id.* at 369 (Powell, J., concurring in judgment) ("In an unbroken line of cases reaching back into the late 1800s, . . . this Court [has] recognized, virtually without dissent, that unanimity is an indispensable feature of federal jury trial."). Sir William Blackstone praised trial by jury as "the glory of the English law," describing "it [a]s the most transcendent privilege which any subject can enjoy or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the *unanimous* consent of his neighbors and equals." 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 379 (1768) (emphasis added); *accord Blakely v. Washington*, 542 U.S. 296, 301 (2004) (affirming the "longstanding tenet[] of common-law criminal jurisprudence: that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours'") (quoting 4 BLACKSTONE, COMMENTARIES 349-50).

Wielded as a defense against abuses of imperial power, juries played a critical role before the Revolution in resisting royal authority. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 871 (1994).[2] The British Crown's subsequent efforts to minimize the role of colonial juries only galvanized the colonists; its efforts to deprive them of trial by jury would become a key grievance in the Declaration of Independence. *Id.* at 873-76.

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[2] Indeed, four colonial constitutions expressly required unanimity, and others provided for trial by jury in accordance with common law. *Apodaca*, 404 U.S. at 409 n.3.

In framing the Constitution, the Founders were steadfast in their support of juries as an institution, guaranteeing the right to trial by jury in criminal cases not once, but twice – in both Article III and the Sixth Amendment.[3] U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI. As Alexander Hamilton noted, "the friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury." 2 ALEXANDER HAMILTON & JOHN JAY, THE FEDERALIST NO. 83, at 331 (1788).

Given their experience under British rule, "[t]hose who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority." *Duncan*, 391 U.S. at 156. Justice Joseph Story remarked, "The great object of a trial by jury in criminal cases is, to guard against a spirit of oppression and tyranny on the part of the rulers, and against a spirit of violence and vindictiveness on the part of the people." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1774 (1833).

Although the Framers were slightly more optimistic about the willingness of appointed judges to resist Executive and majoritarian oppression, they also acknowledged that the protections of independence,

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[3] The Framers' particular concern with the federal government overreaching in criminal matters is reflected not only by the prominence that the right to trial by jury was given in the Constitution, but also the specific prohibitions against Bills of Attainder and Ex Post Facto laws. U.S. CONST. art. I, § 9, cl. 3.

lifetime tenure, and undiminishable salary were not entirely sufficient. "[M]ore than a permanent government official – even an independent Article III judge – was required to safeguard liberty," since judges "would be appointed by the central government, and might prove reluctant to rein in their former benefactors and current paymasters." Akhil Reed Amar, *The Bill of Rights as a Constitution,* 100 YALE L.J. 1131, 1158 (1991). Likewise, Justice Story viewed "the severe control of courts [and] the firm and impartial verdict of a jury sworn to do right, and guided solely by legal evidence and a sense of duty" as "a double security against the prejudices of judges, who may partake of the wishes and opinions of the government, and against the passion of the multitude, who may demand their victim with a clamorous precipitancy." STORY, *supra*, § 1774.

While the Framers did not explicitly provide for unanimous jury verdicts in the Constitution, their writings reflect a shared understanding that the right to trial by jury *meant* the right to a unanimous verdict. As John Adams wrote, "It is the unanimity of the jury that preserves the rights of mankind[.]" 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES 376 (1797). James Madison's original draft of the Sixth Amendment included the phrase "with the requisite of unanimity for conviction." While some assert that its later removal "was intended to have some substantive effect," the more likely view is that this language was removed as surplusage, as the unanimity requirement was "thought already to be implicit in the very concept of the jury." *Apodaca*, 404 U.S. at 409-10.

The Framers also recognized that the tyranny of the majority – inherent in democracy – that they now faced differed somewhat from the royal tyranny they had known before. Nonetheless, they regarded the jury in criminal cases as an equally effective check against this form of potential oppression. As Hamilton observed, "it would be altogether superfluous to examine . . . how much more merit [the jury] may be entitled to as a defence against the oppressions of an hereditary monarch, than as a barrier to the tyranny of popular magistrates in a popular government. Discussions of this kind would be more curious than beneficial, as all are satisfied of the utility of the institution, and of its friendly aspect to liberty." THE FEDERALIST NO. 83, at 332. Lysander Spooner similarly noted, "[t]he will, or the pretended will, of the majority, is the last lurking place of tyranny at the present day," and the jury's ability to limit the power of the majority is "the crowning merit of the trial by jury." LYSANDER SPOONER, TRIAL BY JURY 206 (1852).

The unanimity requirement was considered vital to the jury's ability to serve as a powerful check on the majority: "the trial by jury says that no man's *rights* . . . shall be determined by any such standard as the mere will and pleasure of majorities; but only by the unanimous verdict of a tribunal fairly representing the whole people . . . ." *Id.* at 214. Justice Wilson similarly observed that "the evidence, upon which a citizen is condemned, should be such as would govern the judgment of the whole society: and we may require the unanimous suffrage of the deputed body who try, as the necessary and proper evidence of that judgment." 2 JAMES WILSON, WORKS OF THE HONOURABLE JAMES WILSON 315 (1804). He added "That the sentiments of the majority shall govern, is,

as we have showed at large, the general rule of society. To this rule we have seen the strongest reason to introduce an exception, with regard to verdicts of conviction in criminal prosecutions." *Id.* at 352.

But juries can serve as an effective check against the government and the majority only if the unanimity requirement ensures that minority voices are heard. Removal of a lone holdout juror by a federal judge without clear and convincing evidence that the juror is incapable of performing her duties threatens to undermine the guarantee that "[t]he jury is a fair epitome of 'the country' at large, and not merely of the party or faction that sustain[s] . . . the government" and "that the classes, who are oppressed by the laws of the government . . . will have their representatives in the jury," as the Framers originally intended. SPOONER, *supra*, at 7.

B. This Court Has Steadfastly Guarded The Jury's Central Role In The Criminal Justice System By Repeatedly Striking Down Practices That Are Inconsistent With The Original Understanding Of Article III And The Sixth Amendment

While a plurality of this Court concluded in *Apodaca* that the Sixth Amendment's unanimity requirement was not incorporated against the States through the Due Process Clause of the Fourteenth Amendment, Justice Powell's controlling opinion nevertheless made clear "that unanimous verdicts are *essential* in federal jury trials." 406 U.S. at 366, 370 (emphasis added). Justice Powell reasoned that the unanimity requirement applied against the federal government (but not the States) "because [it] [wa]s

mandated by history," declining to rely on the broader argument that unanimity was "fundamental to the function performed by the jury." *Id.* at 370; *see also id.* at 379 (rejecting the "assumption that the members of the jury constituting the majority [will fail to] consider the minority's viewpoint in the course of deliberation" and "find[ing] nothing in Oregon's experience to justify the apprehension that juries not bound by the unanimity rule will be more likely to ignore their historic responsibilities").[4] Empirical studies conducted in the past four decades, however, call into question (if not outright reject) those assumptions regarding the jury's deliberative process that Justice Powell (and the plurality) relied on to support the notion that unanimity is somehow not fundamental to a jury trial. *See* Charlan Nemeth, *Interactions Between Jurors as a Function of Majority v. Unanimity Decision Rules*, *in* IN THE JURY BOX: CONTROVERSIES IN THE COURTROOM 250 (Lawrence S. Wrightsman et al., eds., 1987) (finding that juries not bound by unanimity rule show marked tendency to "stop[] . . . deliberat[ing] when the required number [of votes are] reached").

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[4] Whether that incorporation analysis would apply today is in doubt. Because the right to trial by jury is incorporated against the states, all of the concomitant aspects of that right should be incorporated as well. *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 (2010) ("[I]ncorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'") (plurality opinion, internal citation omitted); *id.* at 3058, 3064, 3068 (Thomas, J., concurring in judgment); *see also Herrera v. State of Oregon*, No. 10-344, Pet'r's Br. for Writ of Certiorari at 5-11.

In any event, the right to a unanimous verdict remains a bedrock constitutional right in federal criminal cases – and, therefore, any practice that infringes on that right, such as the removal of a properly empanelled juror, should be subject to strict scrutiny. In this context, that means there must be clear and convincing evidence of a compelling and neutral reason for removing a juror during deliberations. The fact that doing so might be viewed as inconvenient or inefficient is no argument to the contrary. *Cf. Blakely*, 542 U.S. at 326 ("Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy.") (O'Connor, J., dissenting); *United States v. Booker*, 543 U.S. 220, 244 (2004). As this, Court explained, casting away well-intentioned sentencing regimes was necessary because the *Apprendi* rule[5] "reflects not just respect for longstanding precedent, but the need to give *intelligible content to the right of jury trial*. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, *jury trial is meant to ensure their control in the judiciary*." *Blakely*, 542 U.S. at 306 (emphasis added). Steadfast adherence to the unanimity rule – and rigorous skepticism of any action that might undermine it – is no less fundamental in giving "intelligible content" to the right to trial by jury.

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[5] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

II. This Court Should Grant *Certiorari* Because Permitting An *Allen* Charge Where The Lone Holdout Juror's Identity Has Been Divulged And Later Removing That Juror Would Strip Unanimous Verdicts Of Their Legitimacy And Exacerbate The Suppression Of Minority Viewpoints In Jury Deliberations

A. A Unanimous Verdict Decided By A Jury That Is Representative Of The Community Promotes Social Cohesion And Confidence In The Legal System

"It is [] the established tradition in the use of juries as instruments of public justice that the jury be a body *truly representative* of the community." *Smith v. Texas*, 311 U.S. 128, 130 (1940) (emphasis added). Its "purpose . . . is to impress upon the [criminal] defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair." *Powers v. Ohio*, 499 U.S. 400, 413 (1991). Indeed, the "unmistakable import of this Court's opinions . . . is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

Of course, for the community to accept any given jury's verdict as "fair," it must not only be confident that every (eligible) member of the community has an equal opportunity to be selected as a juror, but that those selected have the opportunity to participate in the jury's deliberative process free from coercion or other unwarranted intrusion. Otherwise, the community (or at the least those segments that might

view the jury process with suspicion – primarily, those with minority perspectives) is bound to lose confidence in the criminal justice system. *See, e.g.*, *id.* at 530 ("Community participation in the administration of the criminal law moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.").

That would be an unwelcome development not only from a constitutional perspective but from a political one as well. Nancy S. Marder, *Juries, Justice and Multiculturalism* ("*Juries, Justice*"), 75 S. CAL. L. REV. 659, 661 (2002) (observing that juries play "a key role . . . in constituting the judiciary . . . [and] [a]s an institution consisting of ordinary citizens temporarily called to serve a governmental function, the jury is able to dispel popular distrust of the judiciary and secure community acceptance for verdicts"). Indeed, the more closely a jury's composition reflects that of its members' community, the greater the perceived legitimacy and acceptance of its verdict. *See, e.g.*, Marder, *Juries, Justice*, *supra*, at 662 ("If there is to be broad community acceptance of a jury's verdict, then the jury must be seen as drawing its members from the entire community."). This is so for the same reason the Constitution's unanimity requirement bolsters a verdict's legitimacy: it provides the community with confidence that the verdict accurately reflects the *entire* community's values and social norms. *See, e.g.*, Samuel R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research*, 2 SOC. ISSUES & POL'Y REV. 65, 67, 81 (2008) (noting that "[a] jury's racial composition . . . has the potential to impact the way its verdict is perceived by the

surrounding community," and that "homogenous juries can appear to be less than impartial, inspire concerns that the jury will have undue affinity toward other members of the majority group, and elicit the fear that minority litigants will have little 'voice' in the legal process"); Joshua Wilkenfeld, *Newly Compelling: Reexamining Judicial Construction of Juries in the Aftermath of Grutter v. Bollinger*, 104 COLUM. L. REV. 2291, 2314 (2004) ("Communities view demographically balanced juries as more legitimate than those that are unreflective.").[6]

In addition to promoting social acceptance and cohesion, the empirical research on jury decision-making has shown that both unanimity and diversity actually produce more careful and thorough jury deliberations and more accurate verdicts. *See, e.g.*, REID HASTIE, ET AL., INSIDE THE JURY 108 (1983) (finding that mock juries that were required to reach a unanimous verdict deliberated more thoroughly and spent more time discussing the evidence); Shari Diamond, et al., *Revisiting the Unanimity*

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[6] Not surprisingly, where non-diverse juries convict defendants whose racial group is not represented among their members, societal acceptance of the verdicts is low and under-represented groups demonstrate dissatisfaction with the community. *See, e.g.*, Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L. J. 704, 707 (1995) (noting that the acquittal of the four white police officers in the Rodney King case by a jury containing no African-Americans "triggered the worst race riot in American history"); Leslie Ellis & Shari Seidman Diamond, *Race, Diversity and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.–KENT L. REV. 1033, 1038 (2003) ("racial composition of the jury" in the Rodney King and O.J. Simpson cases "negatively affected both the juries' decision-making processes and the legitimacy of the verdicts").

Requirement: The Behavior of the Non-Unanimous Civil Jury, 100 NW. U. L. REV. 201, 212-17 (2006) (documenting that real juries were less concerned about deliberations and refused to consider the merits of the minority view when told that unanimity was unnecessary); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1263-64 (2000) ("[R]esearch conducted in the past two decades reveals that eliminating the obligation to secure each person's agreement on the verdict can result in truncating or even eliminating jury deliberations. By discouraging meaningful examination of opposing viewpoints, majority rule [on juries] impoverishes deliberations.") (citations omitted).

No two jurors will interpret the evidence in exactly the same way. Their differing experiences shape how they "organize[] the information . . . receive[d] about a case into what for [them] is the most plausible account of what happened and then pick[] the verdict that fits that story best." Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 78 (1993) ("Jurors may interpret the same evidence differently depending on which stories they choose.") (citation omitted); *see also* James A. Holstein, *Jurors' Interpretations and Jury Decision Making*, 9 LAW & HUM. BEHAV. 83, 84-85 (1985).

For instance, when presented with the same evidence of mitigating factors in death penalty cases, what white jurors often viewed as "incorrigibility, a lack of emotion, and deceptive behavior," black jurors took as "a disadvantaged upbringing, remorse, and sincerity." William Bowers, et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of*

Juror's Race and Jury Racial Composition, 3 U. PA. J. CONST. L. 171, 248 (2001); *see also* King, *supra*, at 81 ("Because racial background may influence a juror's judgment of whether any given story is a reasonable explanation of events, black and white jurors may reach different conclusions after evaluating the same evidence.").

Studies also suggest that the deliberative process itself significantly *benefits* from the presence of multiple viewpoints. A jury composed of individuals with diverse experiences can positively influence the quality of deliberations by making it more likely that jurors will be able to "bridge cultural [and socioeconomic] gaps" between each other and the defendant. *See, e.g.*, Taylor-Thompson, *supra*, at 1285. That in turn can lead to an even wider range of deliberations. *See, e.g.*, Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations* ("*Jury Deliberations*"), 90 J. PERSONALITY & SOC. PSYCHOL. 597, 599 (2006) ("Diverse juries enjoy wider ranging discussions because White and Black jurors bring different experiences and perspectives to the jury room."); Nancy S. Marder, *Gender Dynamics and Jury Deliberations*, 76 YALE L.J. 593, 604 (1987) ("The use of juries is predicated on the assumption that different people see things differently, and one function of the jury is to bring people's different perceptions to the trial process.").

In a recent study of mock juries, for example, racially "heterogeneous groups deliberated longer and considered a wider range of information than . . . homogenous groups." Sommers, *Jury Deliberations*,

supra, at 598. They also demonstrated superior problem solving skills, "group creativity, information sharing, flexibility, and thoughtfulness." *Id.*; *accord* John Gastil, et al., *Do Juries Deliberate? A Study of Deliberation, Individual Difference, and Group Member Satisfaction at a Municipal Courthouse*, 38 SMALL GROUP RES. 337, 354 (2007) (ideological diversity on juries "likely prompt[s] jurors to consider different interpretations of the law," and "stimulates discussion"); Wilkenfeld, *supra*, at 2307-08 (stating that "[l]egal theory supports the proposition that juries perform better the more they maintain the community's diversity," and noting that "diversity may increase the *capacity* of a jury to engage in factfinding by enhancing the jury's ability to interpret the significance of facts and law" and that "diverse juries are, in the aggregate, better able to remember and understand a greater amount of material discussed at trial than homogenous juries") (emphasis in original).

Without the benefit of diverse perspectives, jurors may, for example, be prone to favor members of their own group. *See, e.g.*, Sommers, *Jury Deliberations*, *supra*, at 598; Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1626-29 (1985) (citing studies demonstrating that white subjects "were more likely to find a minority-race defendant guilty than they were to find an identically situated white defendant guilty," but that after deliberation between juror members of different ethnic groups, "the jurors' ethnicity no longer exerted a significant influence on their verdicts") (citing Jack Lipton, *Racism in the Jury Box: The Hispanic Defendant*, 5 HISPANIC J. BEHAV. SCI. 275, 282 (1983)). The effect of a jury's racial composition is perhaps most evident in death penalty cases, where empirical

studies report that black defendants are less likely to receive death sentences when black citizens are represented on the jury. *See, e.g.*, Bowers, *supra,* at 192 & Tbl. 1, 259 (finding that life sentence was two times more likely when jury contained at least one black male, while death penalty was three times more likely when jury contained five or more white male jurors); David Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview*, 83 CORNELL L. REV. 1638, 1721 n.159 (1998) ("Preliminary findings from our analysis of jury racial composition . . . suggest that black defendants are treated less punitively vis-à-vis non-black defendants as the proportion of blacks on the juries increases.").

In short, these studies confirm what this Court has long recognized: that juries benefit when they are drawn from a cross-section of the community. Accordingly, the Court has repeatedly struck down practices that have the "effect . . . to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." *Peters v. Kiff*, 407 U.S. 493, 503, 510 (1972); *Glasser v. United States*, 315 U.S. 60, 85-86 (1942) (the jury should "be a body truly representative of the community . . . and not the organ of any special group or class").[7]

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[7] *See also Batson v. Kentucky*, 476 U.S. 79, 87 (1986) ("[S]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of system of justice."); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994).

The benefits of a unanimous verdict delivered by a representational jury are lost, however, if the trial judge short-circuits the deliberative process – as may have occurred here – by not only giving an *Allen* charge where the lone holdout's identity was known but then removing that holdout where the context suggests that her removal was based, at least in part, on her position during deliberations.[8] Although the verdict here was unanimous, it was only nominally so, because it did not reflect the honestly held views of the holdout.

B. Permitting Judges To Issue An *Allen* Charge Where The Lone Holdout Juror's Identity Is Known Magnifies The Already Significant Psychological Pressure That Lone Holdouts Face To Accede To The Majority Viewpoint

Not surprisingly, those in the minority already feel significant pressure to conform to the majority's position. It is well understood that maintaining a minority viewpoint is extraordinarily difficult, even in low-pressure, consequence-free situations – and even where the majority's position is *clearly wrong*. *See, e.g.*, Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40

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[8] To be clear, *amicus curiae* is not suggesting that the removal of a lone holdout is a *per se* constitutional violation. There certainly are circumstances where removal of a juror (holdout or otherwise) is required to preserve the parties' rights to an impartial jury. *See, e.g.*, *United States v. Thomas*, 116 F.3d 606, 613 (2d Cir. 1997) (juror "dismissals have been upheld repeatedly in cases where the trial court found the juror was no longer capable of rendering an impartial verdict").

U. MICH. J.L. REFORM 569, 607-10 (2007) (discussing Professor Asch's ground-breaking study in which a solid majority intentionally misstated their view as to the length of a line, and despite not voicing any express disapproval of holdouts, holdouts nonetheless felt "an oppressive sense of loneliness which increased in prominence as [they] contrasted their situation with the apparent assurance and solidity of the majority") (quoting Solomon E. Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 PSYCHOL. MONOGRAPHS 1, 27-32 (1956)); *see also* Note, *On Instructing Deadlocked Juries*, 78 YALE L. J. 100, 110 (1968) ("Participants in a discussion are often influenced to change their opinion simply by the knowledge that an overwhelming majority disagrees with them. Consistent disapproval by the majority can shake a small minority's faith even in judgments it believes to be right.").

The fewer in the minority, the more intense the pressure they face to conform. *See, e.g.*, Bibb Latané & Sharon Wolf, *The Social Impact of Majorities and Minorities*, 88 PSYCHOL. REV. 438, 439, 441 (1981) ("[T]he greater the number of people advocating a position, the greater are their resources for rewarding those who conform to that position and punishing those who deviate . . . . When influence pressure is generated by a unanimous majority, all of the social forces acting on an individual target will pull him in the same direction."). In the case of the lone holdout – a minority of one – that pressure to conform is at its zenith. *See generally* Reichelt, *supra*, at 610.

Lone holdouts on juries present a special case. In this setting, the holdout juror faces more than "silent

pressure," but the pressure to accede to the view of "a unanimous majority of jurors who have been ordered to stay in a room until they reach a unanimous verdict through deliberation." *Id.*; Sommers, *Jury Deliberations*, *supra*, at 600 (noting that a lone holdout "who perceives a lack of social support or potential allies may be particularly likely to remain quiet and succumb to group pressure") (citation omitted). Accordingly, lone holdouts, who – as was the case here – may often represent minority backgrounds, can experience significant discomfort and stress, and often face implied coercion at the hands of the majority. *See, e.g.*, *United States v. Symington*, 195 F.3d 1080, 1084 (9th Cir. 1999) (describing holdout juror's complaint that she was pressured by the other jurors); *Love v. Yates*, 586 F. Supp. 2d 1155, 1187 (N.D. Cal. 2008) (same); *Robinson v. Gibson*, 35 F. App'x 715, 719 (10th Cir. 2002) (discussing African-American female juror's claim that she was intimidated into voting for the death penalty by her fellow jurors).

Lone holdouts face not only pressure from fellow jurors, but institutional pressure from the trial judge. Because the judge "holds a powerful, respected position in the jurors' eyes," she is well-positioned to significantly influence jury decision-making (and frequently does so). Note, *Deadlocked Juries and the* Allen *Charge*, 37 ME. L. REV. 167, 173 (1985) (citing *United States v. Flannery*, 451 F.2d 880, 883 (1st Cir. 1971)). "Courts have [therefore] long recognized both the influence a trial judge may have on jurors and the subtle ways in which that influence can become unduly coercive." Danielle Courselle, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. REV. 203, 224 (2005).

For example, in *Quercia v. United States*, 289 U.S. 466, 470 (1933), this Court observed that a trial judge's decision to comment on evidence even before the jury had retired for deliberations, while not wholly inappropriate, must be done with care because "[t]he influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.'" Where deliberations have been ongoing, and there is an impasse – as in the case of a lone holdout – "a[n] [even] heightened potential for coercion exists when a judge communicates with a jury." Courselle, *supra*, at 225; *accord* Reichelt, *supra*, at 613. Studies in fact confirm that after receiving an *Allen* charge, "jurors in the minority feel coerced [into] chang[ing] their votes, while leading those in the majority to exert increasing amounts of social pressure." Vicki L. Smith & Saul M. Kassin, *Effects of the Dynamite Charge on the Deliberations of Deadlocked Mock Juries*, 17 LAW & HUM. BEHAV. 627, 640-41 (1993) (reviewing two studies discussing the effect *Allen* charges have on hung juries).

This case appears to be a paradigmatic example of those exact pressures at play: Juror No. 10 was a woman of South American descent who, for various reasons, appears to have had difficulty in articulating her viewpoint to the majority. That difficulty, in turn, gave rise to symptoms of emotional "distress" and "strain" that could have been mistaken as a lack of willingness to deliberate for "health" reasons, *see* Pet'r's App. at 17a-20a, which ultimately led to her dismissal. These circumstances thus demonstrate why there needs to be a higher degree of scrutiny applied to the removal of holdout jurors, since there will often be plausible and facially neutral reasons for removal –

and yet, those reasons may in fact merely be derivative of the inherent pressures resulting from a holdout's genuinely held assessment of the evidence.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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November 17, 2010